

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2014-06
Issued July 23, 2014**

FACTS

The inquiring attorney is employed on a part-time basis as a solicitor for City A. He/she is paid hourly. As a part-time solicitor, the inquiring attorney prosecutes one day a week misdemeanor criminal offenses that are charged by the city's police department. The inquiring attorney also has a private law practice which consists primarily of criminal defense work throughout the various courts in the State. The inquiring attorney seeks the Panel's advice about whether it is a conflict of interest to represent in his/her private practice an individual who is charged by the police department of City B. The misdemeanor cases of City A and of City B are heard before the same division of the district court.

ISSUE PRESENTED

Is it a conflict of interest for the inquiring attorney, who is a part-time prosecuting attorney for City A, to represent an individual who is charged with a misdemeanor by City B, where both cases will be heard in the same division of the district court?

OPINION

Rule 1.7 of the Rules of Professional Conduct does not *per se* prohibit the inquiring attorney, who serves as a part-time prosecutor for City A from representing a criminal defendant who is charged by City B where both matters are heard in the same division of the district court. The inquiring attorney must determine in each case on the basis of its particular facts, whether the representations are directly adverse, or whether there is a significant risk that the representations will be materially limited.

REASONING

Rule 1.7 of the Rules of Professional Conduct is pertinent to this inquiry. The Rules states as follows:

Rule 1.7. Conflict of interest: Current clients. (a)
Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Accepting a position as a part-time solicitor of City A makes City A a client of the inquiring attorney. As a private attorney the inquiring attorney seeks to represent an individual charged with a misdemeanor by City B. Rule 1.7 requires an examination of whether the representation of one client will be directly adverse to another client (Rule 1.7(a)(1), and whether the representation of one client presents a significant risk that the representation of another current client will be materially limited (Rule 1.7(a)(2)).

In the instant inquiry, the representation of the individual charged and prosecuted by City B is not directly adverse to the representation of City A. The individual is not in a position adverse to City A. The interests of the individual defending against a criminal charge made by a City B police officer are not adverse to the interests of City A in the prosecution of individuals charged with misdemeanors by City A police officers. Therefore, there exists no conflict of interest under Rule 1.7(a)(1), in the inquiring attorney's proposed representation of a criminal defendant charged by City B.

By contrast, a prohibited conflict of interest under Rule 1.7(a)(1) would exist if a prosecuting attorney for City A were to take on the representation of an individual charged with a misdemeanor by City A, as an individual charged by City A is in a position adverse to City A. See Rhode Island Supreme Court Ethics Advisory Panel Opinion 90-36 (1990) (neither part-time city solicitor, nor members of her law firm may represent a person charged criminally by the city); Rhode Island Supreme Court Ethics Advisory Panel Opinion 90-14 (1990) (if a lawyer accepts any position as city solicitor, lawyer and all members of her firm may not represent a client whose position is directly adverse to the city).

Even where the interests of two or more current clients are not directly adverse, a conflict of interest may exist pursuant to Rule 1.7(a)(2). Pursuant to sub-paragraph (2) of Rule 1.7, a conflict of interest exists if there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by the lawyer's personal interests.

The Panel does not believe that there is a significant risk that the inquiring attorney's representation of an individual charged and prosecuted by City B will be materially limited by his/her representation of City A in prosecuting individuals charged by City A, or vice versa. That the inquiring attorney prosecutes for one client in one case and defends a criminal who is charged by City B in another case, even in the same division of the district court, does not *per se* materially limit either representation. Comment [23] states:

The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

That is not to say that a conflict of interest under Rule 1.7 could never arise for the inquiring attorney. A determination of whether a conflict of interest exists is fact specific and must be decided on a case-by-case basis. In the absence of an actual conflict of interest which is based on particular facts giving rise to a direct adversity, or to a significant risk of material limitation of one representation by another representation, the Panel takes the position that Rule 1.7 does not *per se* prohibit the inquiring attorney's concurrent representation of City A as its part-time prosecutor, and the representation of a criminal defendant charged by City B. Even where both matters are heard before the same division of the district court, the rule does not prohibit the concurrent representations. The focus of conflicts of interest analysis under Rule 1.7 is loyalty to every client and effective representation, both of which the Panel believes can be accomplished in the circumstances presented in this inquiry. The Panel is further guided in its opinion by a defendant's fundamental right to his or her choice of counsel under the federal and state constitutions.

Accordingly, the Panel concludes that Rule 1.7 does not *per se* prohibit the inquiring attorney, who is a part-time prosecutor for City A, from representing a criminal defendant who is charged by City B, where both matters are heard in the same division of the district court. The inquiring attorney must determine in each case on the basis of its

particular facts whether the representations are directly adverse or whether there is a significant risk that the representations will be materially limited.

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have bearing on the issues raised by this inquiry.